85-695

Supreme Court, U.S.
FILED
OCT 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85-

IN THE

Supreme Court Of The United States

1985 TERM

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Defendant-Petitioner,

v.

EVAN D. COLEMAN,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

HOBART A. MCWHORTER, JR.
JOSEPH B. MAYS, JR.

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

Attorneys for Petitioner

22 pp

QUESTION PRESENTED

Whether Ala. Code § 12-22-72 (1975) (the "statute") which imposes a ten percent (10%) affirmance penalty upon defendants, but not plaintiffs, who unsuccessfully utilize the appellate process is unconstitutional under the Fourteenth Amendment to the United States Constitution.

CERTIFICATE OF INTERESTED PERSONS

Counsel of record for Defendant-Petitioner, Illinois Central Gulf Railroad Company, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States certify that the following listed parties have an interest in the outcome of this case:

1. Illinois Central Gulf Railroad Company;
2. Evan D. Coleman;
3. The firm of Rives & Peterson, and the attorneys working for such firm, including Clarence M. Small, Jr.;
4. The firm of Bradley, Arant, Rose & White, and the attorneys working for such firm, including Hobart A. McWhorter, Jr. and Joseph B. Mays Jr.;
5. The Supreme Court of Alabama.

In accordance with Supreme Court Rule 28.1, all affiliates and subsidiaries of Illinois Central Gulf Railroad Company are set forth in Illinois Central Gulf Railroad Company's Application for Stay.

TABLE OF CONTENTS

Page

I. Question Presented i

II. Certificate of Interested Persons ii

III. Table of Contents iii

IV. Table of Authorities iv

V. Opinions Below 1

VI. Jurisdiction 1

VII. Statutory Provisions Involved 2

VIII. Statement of the Case 3

IX. Reasons for Granting the Writ 4

X. Conclusion 6

XI. Certificate of Service 6

XII. Appendix A-1

TABLE OF AUTHORITIES

Cases *Page(s)*[1]

Aetna Life Insurance Company v. Margaret W. LaVoie and Roger J. LaVoie, Sr., Case No. 84-1601 and Docket No. A-728 4

Evits v. Lucey, 469 U.S. -, 105 S. Ct. 830, 83 L. Ed. 2d 821, *Reh denied*, 105 S. Ct. 1783 (1985) 4

Lindsey v. Normet, 405 U.S. 56, (1972) 5

Other Authorities Cited

Ala. Code § 12-22-72 (1975) 2

Fourteenth Amendment to the United States Constitution 1, 2, 4, 5

28 U.S.C. § 1257 (3) 2

CASE NO. 85-

IN THE

Supreme Court Of The United States

1985 TERM

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Defendant-Petitioner,

v.

EVAN D. COLEMAN,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OPINIONS BELOW

The decision of the Supreme Court of Alabama has not been released for publication in the official reporter, however, a copy is attached hereto as Appendix A. No opinion was issued by the trial court, the Circuit Court of Jefferson County, Alabama.

JURISDICTION

The judgment and opinion of the Supreme Court of Alabama was entered July 19, 1985, Illinois Central Gulf Railroad Company's (ICG) Application for Rehearing was denied August 23, 1985, and ICG's Motion for Partial Stay of Judgment was denied September 23, 1985. These proceedings by the Alabama Supreme Court have upheld the statute which is challenged as contrary and repugnant to the provisions of the Fourteenth Amendment to the United States Constitution.

This Court has jurisdiction to review this case on petition for writ of certiorari pursuant to the provisions of 28 U.S.C. 1257 (3).

STATUTORY PROVISIONS INVOLVED

The Alabama statute (the "statute") involved is Ala. Code § 12-22-72 (1975) which provides as follows:

> When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 percent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs by the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court. (Code 1852, §§ 3032, 3033; Code 1867, §§ 3500, 3501; Code 1876, §§ 3941, 3042; Code 1886, §§ 3661, 3662; Code 1896, § 478; Code 1907, § 2893; Code 1923, § 6153; Code 1940, T. 7, § 814; Acts 1951, No. 724, p. 1275.)

The statute is violative of the Fourteenth Amendment of the United States Constitution. The applicable portion of which provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they

reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

This case was commenced on September 27, 1979 against Illinois Central Gulf Railroad Company (ICG) and two other defendants: Steel City Erection Company, Inc. and Steel City Crane Rentals, Inc. (hereafter "Steel City defendants"). The action arose from an injury the plaintiff sustained when a tree branch fell upon his head, the branch having been knocked from the tree by the boom of a crane.

The case was tried in the Circuit Court of Jefferson County, Alabama. The jury returned a verdict in favor of the plaintiff for $500,000 against ICG, and a verdict in favor of the Steel City defendants. ICG filed a motion for new trial on December 5, 1983, and concurrently the plaintiff filed a motion for new trial with respect to the judgment in favor of the Steel City defendants. These motions were deemed to be denied because ninety days elapsed without a ruling by the trial court.

ICG appealed to the Alabama Supreme Court on April 12, 1984, and the plaintiff also perfected an appeal to the Court on this date. The Alabama Supreme Court without the assistance of oral argument by counsel affirmed the lower court on July 19, 1985. On August 2, 1985, ICG filed an Application for Rehearing. In ICG's Application, ICG pointed out to the Alabama Supreme Court the constitutional implications of applying the statute, and the 10% affirmance penalty without oral argument and in any instance, ICG claimed denial of due process under the Constitution of the State of Alabama and the Fourteenth Amendment to the United States Constitution. The Application for Rehearing was denied on August 23, 1985. ICG filed a Motion for Partial Stay of Execution of Judgment on September 13, 1985.

In the Motion for Partial Stay, ICG argued that application of the 10% penalty pursuant to the statute would contravene the Constitution of Alabama and the Fourteenth Amendment to the United States Constitution. Furthermore, ICG respectfully informed the Alabama Supreme Court that the issue of the constitutionality of the statute was currently pending before the United States Supreme Court in the case of *Aetna Life Insurance Company v. Margaret W. Lavoie and Roger J. Lavoie, Sr.*, Case No. 84-1601, and that a Stay therein had been granted by this Court under Docket No. A-728.

ICG's Motion for Partial Stay was denied on September 23, 1985, wherein the court's only statement was as follows:

> The petitioner having filed his motion for partial stay of execution of judgment, and the same having been duly submitted and considered by the Court,
>
> IT IS CONSIDERED and ORDERED that the motion for partial stay of execution of judgment be, and it is hereby, denied.

Accordingly, ICG has submitted an Application for Stay with the Circuit Justice for the Eleventh Circuit and filed this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

There is a substantial constitutional question as to whether operation of the statute violates a defendant-appellant's rights under the equal protection clause of the Fourteenth Amendment. The statute imposes a penalty of ten percent of a money judgment against all defendants who appeal unsuccessfully to the Supreme Court of Alabama. No similar penalty is imposed upon a plaintiff who appeals unsuccessfully. In the case *sub judice,* the penalty is $50,000.

The equal protection clause of the Fourteenth Amendment to the United States Constitution applies with full force to the rights of a party seeking review in the state appellate courts, *Cf. Evitts v. Lucey,* 469 U.S. -, 105 S. Ct. 830, 83 L. Ed. 2d 821, *Reh. denied,* 105 S. Ct. 1783 (1985), and renders invalid any

state statute that draws irrational distinctions between plaintiff-appellants and defendant-appellants. *Cf. Lindsey v. Normet,* 405 U.S. 56 (1972). In *Lindsey v. Normet, supra,* the court opined that "A state may act to discourage patently insubstantial appeals, if [its] rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." 405 U.S. at 78. The statute here involved could hardly be more discriminatory. On its face, the statute applies only to those who are involuntarily brought into court as defendants and unsuccessfully appeal adverse judgments. The statute places no corresponding penalty upon any plaintiff who receives an adverse judgment. Indeed, unsuccessful plaintiffs may litigate again with no other risk than additional attorney's fees (which burden defendants also bear in an appeal). Consequently, the statute applies to only half of the parties involved in the judicial process.

The statute not only arbitrarily excludes plaintiffs from its application, and is thus patently discriminatory, but has uniform application to all unsuccessful defendants appealing a judgment. Consequently, even though the statute's aim is to prevent frivolous appeals, it applies to all defendants who unsuccessfully appeal regardless of the merits of the appeal. Accordingly, this statute could hardly be "reasonably tailored" to any permissible end. Rather, the statute is tailored to an impermissible end, that if discriminating between a party who initiates litigation as a plaintiff and one who responds to it as a defendant.

As the statute is discriminatory and not "reasonably tailored" to achieve its aim, it is unconstitutional as repugnant to the Fourteenth Amendment of the United States Constitution. Accordingly, ICG submits that the $50,000 affirmance penalty in this case infringes upon its right to equal protection under the Fourteenth Amendment.

CONCLUSION

For the important and substantial constitutional issues involved, a writ of certiorari should be issued to review the judgment and opinion of the Supreme Court of Alabama.

Respectfully submitted,

HOBART A. MCWHORTER, JR.

JOSEPH B. MAYS, JR.

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing have been served upon Clarence M. Small, Esq., c/o RIVES & PETERSON, 1700 Financial Center, Birmingham, AL 35203, by forwarding three (3) copies thereof through the United States mail, first-class postage prepaid and properly addressed, on this 22nd day of October, 1985.

APPENDIX

APPENDIX

JULY 19, 1985

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

83-785	)	
ILLINOIS CENTRAL GULF RAILROAD COMPANY	)	
v.	)	JEFFERSON CIRCUIT COURT
EVAN D. COLEMAN, STEEL CITY ERECTION COMPANY, INC.; STEEL CITY CRANE RENTALS, INC.	)	# CV 79-04021

This cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court be affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that the appellant, Illinois Central Gulf Railroad Company, and Seaboard Surety Company, surety on the supersedeas bond, pay the amount of the judgment of the circuit court plus ten percent damages and interest and the costs of appeal as provided by the Alabama Rules of Appellate Procedure, for which let execution issue.

OPINION BY BEATTY, J. TOLBERT, CJ., MADDOX, JONES AND SHORES, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument (s) herewith set out as same appear (s) of record in said Court. Witness my hand this 11th day of September, 1985.

/s/ ROBERT G. ESDALE
Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1985

Evan D. Coleman

83-744 v.

Steel City Crane Rentals, Inc., and
Steel City Erection Company, Inc.

Illinois Central Gulf Railroad Company

83-785 v.

Evan D. Coleman; Steel City Erection Company, Inc.;
Steel City Crane Rentals, Inc.

Appeals from Jefferson Circuit Court

BEATTY, JUSTICE.

These are appeals by defendant Illinois Central Gulf Railroad Company (ICG) and plaintiff Evan Coleman from jury verdicts against ICG and in favor of defendants Steel City Erection Company, Inc., and Steel City Crane Rentals, Inc. The lawsuit resulted when plaintiff was injured by a tree limb broken off by a crane owned by the Steel City defendants and leased to ICG to clear the wreckage of a train derailment. We affirm.

On October 1, 1978, a train derailed near Tuscaloosa. Plaintiff, a car and wrecker foreman employed by ICG, was one of the workmen sent to remove the wreckage. The evidence disclosed that four groups of workmen are needed to clean up after a derailment: carmen, a track crew, a train crew, and a crane crew. ICG owned a crane and employed a crane crew, but at the time of the derailment they were in Meridian, Mississippi. Therefore, ICG contacted the Steel City defen-

dants and leased a crane and crew for the operation. During the work, the boom of the crane struck and broke off a tree limb, which fell approximately 40 feet onto plaintiff's head. Plaintiff incurred medical expenses and suffered permanent physical impairment as a result of the injury.

Plaintiff brought suit against ICG and the Steel City defendants, alleging four counts of negligence. ICG cross-claimed against the Steel City defendants seeking indemnity, and Steel City Erection Company cross-claimed against ICG seeking indemnity. At the close of all the evidence, the trial court granted ICG's motion for directed verdict on the cross-claim filed by Steel City Erection Company. The jury returned verdicts in favor of the Steel City defendants and in favor of plaintiff and against ICG in the amount of $500,000. ICG and plaintiff filed motions for new trial, which were not ruled upon within 90 days.

On appeal, ICG argues that the verdict against it was contrary to the preponderance of the evidence, and thus that it was entitled to a new trial. ICG also maintains that the trial court erred in refusing to give various written charges to the jury. Plaintiff appealed the verdict and judgment in favor of the Steel City defendants solely to retain them as defendants in the event his verdict and judgment against ICG were reversed.

ICG maintains that the jury verdict against it and in favor of the Steel City defendants is against the preponderance of the evidence because the jury necessarily found that the members of the crane crew employed by the Steel City defendants became the "loaned servants" of ICG, making ICG liable for their negligence. ICG contends that the trial court should have decided as a matter of law that the crane operators were servants of the Steel City defendants, not of ICG, at the time of the accident.

In determining whether an employee has become a loaned servant the ultimate test is: Whose work was the employee doing and under whose control was he doing it. *Dumas v. Dumas Brothers Manufacturing Co.*, 295 Ala. 370, 378, 330 So.2d 426, 432 (1976). It is not the actual exercise of control

which is determinative but rather the reserved right to control the employee. *United States Steel Corp. v. Mathews,* 261 Ala. 120, 123, 73 So.2d 239, 242 (1954). Where the work of the employee is part of a large undertaking, mere suggestions as to details necessary for a cooperative effort must be distinguished from actual authoritative direction and control. 261 Ala. at 124, 73 So.2d at 242.

In the present case, there was considerable evidence taken on this issue. The crane crew was employed and paid by Steel City, which in turn billed ICG for the services. Steel City decided which of its employees to send on any particular assignment. If ICG was dissatisfied in the work, it could dismiss the entire crew, but only Steel City could fire one of its employees. The employees testified that they were working for Steel City and assisting the railorad in clearing the tracks. There was evidence that the positioning of the crane and the movement of the boom were decisions left entirely to the crane crew without direction from the railroad supervisors. However, there was also evidence that the ICG employees specified the way in which the line was to be cleared, the location where the crane crew should begin working, the order of the cars to be put back on the tracks, and the time when the crane crew could leave the site. Railroad employees hooked the crane to the cars and signaled when the crane should lift the car. One of Steel City's crane operators testified as follows:

> "Q. All right. Now, when you reported to that job site at Stokes, are you there for—what purpose are you there for when you report to the job site?
>
> "A. To assist the railroad in clearing the line, or picking up the cars, or whatever they want me to do. I am there to do what they want to do. They called for help.
>
> "Q. How long would you stay there?
>
> 'A. Until they released me.
>
> ". . . .
>
> "Q. All right. And who would tell you what you were going to do and when you were going to do it after you got on the job site?

". . . .

"A. Yes, the ICG officials would tell us what to do.

". . . .

"Q. Well, I will ask you this. Did you do anything on this particular job site that you were not instructed to by the ICG railroad officials to do?

"A. No, sir."

There was also evidence from which the jury could infer that the ICG employees worked with the Steel City crane crew in the same manner they would have worked with the ICG crane crew that was unavailable at that time.

Although the question is a close one, there is sufficient evidence from which the jury could have concluded that ICG employees went beyond suggestions for a cooperative effort and exercised supervisory control over the actions of the Steel City crane crew. If reasonable persons can reach different conclusions on the question of whether a servant of one employee has temporarily become the servant of another, it is a question of fact for the jury. *United States Steel Corp. v. Mathews,* 261 Ala. at 123, 73 So.2d at 241-42. A jury verdict is presumed to be correct and will not be reversed unless the preponderance of the evidence against the verdict is so decided as to clearly convince the appellate court that it is wrong and unjust. *Shelby County v. Oldham,* 246 Ala. 626, 627, 89 So.2d 106, 107 (1956). The presumption of correctness accorded a jury verdict is strengthened when the trial court denies a motion for a new trial. *TG&Y Stores v. Atchley,* 414 So.2d 912, 914 (Ala. 1982). Although the motions for new trial were automatically denied under the provisions of Rule 59.1, A.R.Civ.P., the trial court later entered an order purporting to deny the motions.

We hold that the verdict was not manifestly unjust as against the preponderance of the evidence.

ICG contends that the trial court erred in not giving certain requested written charges and explanatory charges to the jury. Requested charge X instructed the jury that the members of the crane crew were not employees of ICG. This charge was not appropriate, since, as we have already held, the loaned servant

issue was a question of fact. After the trial court refused to give charge X, ICG requested the following written charge on the law relating to the loaned servant doctrine:

"JURY CHARGES ON ISSUE OF BORROWED SERVANT DOCTRINE

"The Court charges you as follows with respect to the claim or contention by defendant Steel City Erection that the members of its crane crew were 'loaned to,' and thus considered employees or servants of, defendant Illinois Central on the occasion when plaintiff sustained injuries, and that defendant Illinois Central is accordingly liable for any negligent acts of the crane crew members. Defendant Illinois Central denies that the crane crew members were other than the employees of the Steel City defendants. In determining the question of whether the crane crew members should be deemed to be the servants or employees of defendant Steel City Erection or defendant Illinois Central on the occasion plaintiff was injured, all competent and relevant evidence with respect to this issue should be considered, including facts relating to these questions and rules:

"Whose business was being performed by the crane crew members and under whose ultimate power and control were they operating? In considering the question of control, a distinction should be considered between authoritative direction and control, and mere suggestion as to details or the necessary cooperation where the work furnished is part of larger undertaking.

"Who hired the crane crew members, who paid them, and who had the right to discharge them?

"Was there any consent or acquiescence on the part of the crane crew members to suspend their employ by Steel City Erection and to change and to become the employees of Illinois Central?

"Who had the right to select which individuals would serve as the crane crew members, the power of substitution of the crane crew members, and the power to discharge such persons?

"Who owned, selected and supplied the crane being used by the crane crew members at the time of the accident?

"Consideration may be given to a comparison of the duration of the employment of the crane crew members by Steel City Erectors and the duration of alleged employ by Illinois Central as a factor in where the proper employment relationship exists.

"This issue is a question of fact to be determined by you, based upon the evidence in this case."

The following oral charge given by the trial court, although not couched in the same specific language, sufficiently sets forth the principles of the loaned servant doctrine as they are found in case law:

"You have heard reference to the fact that the Defendant Steel City contends that these three individuals were—different terms have been used, but the net effect of the terms is to say that these three individuals were at the time in question not the agents, servants or employees of Steel City, but rather were the agents, servants or employees of the railroad. Now, I want to give you some instructions which will be helpful in considering this question. It is for you to determine what the relationship between these parties and individuals was. But an employee may be in the general service of another and, nevertheless, with respect to particular work may be transferred with his own consent or acquiescence to the service of a third person so that the employee becomes a servant of the third person with all the legal consequences of the new relation. Whether one who is usually the servant of one master has become specially. and temporarily the servant of another is a question of fact for you ladies and gentlemen to determine. Now, in determining that, you need to answer these questions: Whose work was the servant doing and under whose control was he doing it? And it is the reserved right of control rather than the actual exercise that furnishes the true test of the relationship. He is master who has the supreme choice of control and direction of the servant and whose will the servant represents in the ultimate results and in all details. There must be careful distinguishing between authoritative direction and control and mere suggestion as to details or necessary cooperation where the work furnished is part of the large undertaking. The fact that the borrower gives in-

> formation and direction to the servant as to details of work or the manner of doing it does not make this general servant of the employer the servant of such other person. Where the evidence does not clearly establish who the employer is consideration must be given to the character of the service to be rendered, duration of the employment and the one who is paying the employee."

ICG contends that the charge is defective with respect to the requisite intent of the employee and requested charge Y, which states that the crane crew members must have agreed to suspend their employment with Steel City and become employees of ICG in order to be considered loaned servants. The oral charge quoted above specifically states that an employee "may be transferred with his own consent or acquiescence to the service of a third person." After reviewing the entire charge to the jury, we find that the issues were fairly covered. We cannot reverse for the refusal to give requested written instructions where the same rules of law were substantially and fairly covered in the trial court's oral charge. Rule 51, A.R.Civ.P.

Let the judgment be affirmed.

AFFIRMED.

Torbert, C.J., Maddox, Jones, and Shores, JJ., concur.

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: _____

EVAN D. COLEMAN

83-744 v.

STEEL CITY CRANE RENTALS, INC., et al.

ILLINOIS CENTRAL GULF RAILROAD CO.
Appellant

83-785 vs.

EVAN D. COLEMAN, ET AL.
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____ Appeal docketed. Future correspondence should refer to the above number.
____ Court Reporter granted additional time to file reporter's transcript to and including
____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
____ Appell___ granted 7 additional days to file briefs to and including
____ Appellant (s) granted 7 additional days to file reply briefs to and including
____ Record on Appeal filed
____ Appendix Filed
____ Submitted on Briefs
____ Petition for Writ of Certiorari denied. No opinion.
xxx Application for rehearing overruled. No opinion written on rehearing.
____ Permission to file amicus curia briefs granted
____

/s/ ROBERT G. ESDALE

Robert G. Esdale, Clerk
Supreme Court of Alabama

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

SEPTEMBER 23, 1985

83-785

ILLINOIS CENTRAL GULF RAILROAD COMPANY	)	
v.	)	JEFFERSON CIRCUIT COURT
EVAN D. COLEMAN; STEEL CITY ERECTION COMPANY, INC.; STEEL CITY CRANE RENTALS, INC.	)	CV-79-04021

ORDER

The petitioner having filed his motion for par.ial stay of execution of judgment, and the same having been duly submitted and considered by the Court,

IT IS CONSIDERED and ORDERED that the motion for partial stay of execution of judgment be, and it is hereby, denied.

Torbert, C. J., and Maddox, Faulkner, Almon, Shores, Adams, and Houston, JJ., concur.

Jones and Beatty, JJ., not sitting.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument (s) herewith set out as same appear (s) of record in said Court. Witness my hand this 23rd day of September, 1985.

/s/ ROBERT G. ESDALE
Clerk, Supreme Court of Alabama

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85-695

IN THE

Supreme Court Of The United States

1985 TERM

ILLINOIS CENTRAL GULF RAILROAD COMPANY
Defendant-Petitioner

v.

EVAN D. COLEMAN
Plaintiff-Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

*CLARENCE M. SMALL, JR.
STEVEN A. BENEFIELD

RIVES & PETERSON
1700 Financial Center
Birmingham, Alabama 35203
(205) 328-8141

Attorneys for Respondent
Evan D. Coleman

**Counsel of Record*

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

I. Table of Contents i

II. Table of Authorities ii

III. Summary of Argument 1

IV. Argument 3

V. Conclusion 11

VI. Certificate of Service 12

TABLE OF AUTHORITIES

Cases	*Page*
Cardinale v. Louisiana, 394 U.S. 437 (1969)	7
Chapman v. Rivers Construction Co., 284 Ala. 635, 227 So. 2d 403 (1969)	8, 9
City of Birmingham v. Bowen, 254 Ala. 41, 47 So. 2d 174 (1950)	9
City of Cleburne v. Cleburne Living Center, 473 U.S. ____, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)	8
Dewey v. Des Moines, 173 U.S. 193 (1899)	4, 5, 6
Douglas v. California, 372 U.S. 353 (1963)	8
Gomillion v. Lightfoot, 364 U.S. 339 (1960)	8
Hill v. California, 401 U.S. 797 (1971)	6
Hughes v. Rowe, 449 U.S. 5 (1980)	9
Illinois v. Gates, 462 U.S. 213 (1983)	3, 5, 6, 7, 8
Lindsey v. Normet, 405 U.S. 56 (1972)	8
Louisville & Nashville Railroad v. Stewart, 241 U.S. 261 (1916)	10
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940)	3, 6
McGowan v. Maryland, 366 U.S. 420 (1961)	8
Montgomery Light & Water Power Co. v. Thombs, 204 Ala. 678, 187 So. 205 (1920)	8, 9
Morrison v. Watson, 154 U.S. 111 (1894)	8
NAACP v. Alabama, 377 U.S. 288 (1964)	8
State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 134 (1945)	6
Terminiello v. Chicago, 337 U.S. 1 (1949)	6
Vachon v. New Hampshire, 414 U.S. 478 (1974)	6
Williamson v. Lee Optical, 348 U.S. 483 (1955)	10
Younger v. Harris, 401 U.S. 37 (1971)	6

TABLE OF AUTHORITIES – (Continued)

Constitution, Statutes and Rules: *Page*

United States Constitution

Fourteenth Amendment, Section 1 (Due Process Clause) 1, 4

Fourteenth Amendment, Section 1 (Equal Protection Clause) 1, 4, 8

Federal Statutes:

28 U.S.C. Section 1257 (3) 3

42 U.S.C. Section 1988 9

State Statutes:

Section 12-22-72, *Code of Alabama* (1975) ..... *passim*

Section 19.160, *Oregon Revised Statutes* (1981) 7

Section 16.1-113, *Virginia Code* (1982) (amended 1984) 7

CASE NO. 85-695

IN THE

Supreme Court Of The United States

1985 TERM

ILLINOIS CENTRAL GULF RAILROAD COMPANY
Defendant-Petitioner

v.

EVAN D. COLEMAN
Plaintiff-Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

SUMMARY OF ARGUMENT

The Petition for Certiorari before this Court is due to be denied because petitioner did not raise the question presented in the petition in state court. In state court petitioner challenged only the procedural propriety of applying Section 12-22-72 of the Code of Alabama (1975)[1] to the judgment against petitioner, while denying petitioner's request for oral argument as a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[2] In this Court petitioner attempts to raise the substantive invalidity of § 12-22-72 under the Equal Protection Clause of the Fourteenth

[1]Hereinafter referred to as "§ 12-22-72" or "the statute".

[2]Hereinafter referred to as "Due Process or "Due Process Clause". All references to "Fourteenth Amendment" refer to the Constitution of the United States.

Amendment.[3] Because petitioner has not previously raised the question it seeks to present to this Court, petitioner fails to satisfy the "not pressed or passed upon below" rule. Therefore, the Petition for Certiorari should be denied.

Further, the petition fails to raise a substantial federal question. Petitioner asserts that the application of § 12-22-72 is discriminatory because it applies only to defendants. Contrary to petitioner's assertion, § 12-22-72 applies to any person against whom a money judgment is rendered, who files a supersedeas bond to avoid paying the judgment while on appeal, and against whom judgment is affirmed without change, whether that person is a plaintiff or a defendant. Indeed, § 12-22-72 applies to the same class of persons who must pay post-judgment interest. Petitioner fails to note the obviously legitimate objective of the statute, which is to compensate persons who must await payment of a judgment already proved and won until the completion of an appeal that affirms the judgment without change. The means of achieving the state's objective, adding ten percent damages to a judgment affirmed without change, is rationally related to its objective since application of the statute depends upon a finding that the appellee's entitlement to judgment was without error. The statute is reasonably tailored to achieve the objective in that the amount of the damages varies with the amount of the judgment, the use and benefit of which the appellee is unjustly denied. In essence, § 12-22-72 is nothing more than additional post-judgment interest at a fixed rate for a statutory time period of one year. Alternatively, it might be considered a statutory "origination fee" charged for borrowing appellee's money while on appeal. Whichever view is accepted, the statute is a carefully tailored means of achieving the legitimate objective of the state, which is to compensate appellees in appropriate circumstances for the loss of the use and benefit of money owed to the appellees.

---

[3]Hereinafter referred to as "Equal Protection" or "Equal Protection Clause".

ARGUMENT

I

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED BY PETITIONER WAS NEITHER PRESSED NOR PASSED UPON IN STATE COURT

A. Petitioner Raises a Separate Federal Question in this Court not Presented to the State Court.

Title 28 Section 1257 of the United States Code requires that a federally created right, title or immunity must be "set up or claimed" by petitioner for certiorari jurisdiction of this Court to exist. This Court has held that a claim must have been "either raised or squarely considered and resolved in state court," or, stated differently, "pressed or passed upon in the courts below" in order to be heard by this Court.[4] *Illinois v. Gates,* 462 U.S. 213, 218 n.1 (1983); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434-35 (1940). Petitioner's sole challenge to § 12-22-72 in state court was in petitioner's application for rehearing and supporting brief to the Alabama Supreme Court. Petitioner argued below that application of § 12-22-72 without allowing oral argument on petitioner's appeal violated petitioner's right of Due Process under the Fourteenth Amendment.[5]

---

[4]Although this Court has questioned whether the "not pressed or passed upon below" rule is jurisdictional, *Illinois v. Gates,* 462 U.S. 213, 222 (1983), and although respondent asserts that the rule is jurisdictional, weighty prudential considerations indicate that this Court should deny the petition *sub judice.* See the discussion *infra* at 6-7.

[5]In petitioner's Application for Rehearing and Supporting brief, petitioner stated:

> Finally, ICG states that the assertion of a ten percent penalty with respect to an adverse judgment of $500,000 without the opportunity or grant of requested oral argument is a denial of due process under the Constitution of the State of Alabama and the Fourteenth Amendment to the Constitution of the United States. Application of § 12-22-72 (Ala. 1975) in these circumstances contravenes the Constitution of the State of Alabama and the Constitution of the United States.

Application at 8.

In its petition to this Court petitioner also raises only one question: whether the operation of § 12-22-72 violates petitioner's rights to Equal Protection under the Fourteenth Amendment. *See* Petition for Cert. at 4-5.

The question presented by petitioner to the Alabama Supreme Court and the question presented in the petition *sub judice* are separate and distinct federal questions both facially and substantively. Petitioner's claim in the state court was under the Due Process Clause while petitioner's claim in this Court is under the Equal Protection Clause. Although the Equal Protection Clause and the Due Process Clause are both co· tained in the Fourteenth Amendment, each provides separate identifiable rights and privileges and each depends upon different principles for its application. This is demonstrated by the different nature of the two questions raised. Petitioner's claim in state court attacked the *procedural propriety* of applying § 12-22-72 to a judgment while denying petitioner the opportunity to orally argue its appeal. In this Court petitioner attacks the *substantive validity* of the statute as applied generally.

In *Dewey v. Des Moines,* 173 U.S. 193 (1899), this Court distinguished questions similar to those raised by petitioner below and in this Court. In *Dewey,* a city levied improvement assessments against the owner of property abutting a street paved by the city. A state trial court ordered the property forfeited when the assessments were not paid, and held the owner personally liable for the amount by which the assessments exceeded the value of the lot. In state court the owner argued that the imposition of personal liability against him violated the Due Process Clause because he had not received personal notice of the assessment proceedings. In this Court, the owner also attempted to argue that the assessment itself constituted a taking in violation of the Fourteenth Amendment. The Court held that, beyond arising from a single factual occurrence, the two claims

> are not in anywise necessarily connected . . . . The assessment upon the lots might be valid, while the provision

> for personal judgment might be void, each depending upon different principles; and the question as to the invalidity of the personal judgment might, as in this case, be raised and argued without in any manner touching the question as to the invalidity of the assessment upon the lots.

Dewey v. Des Moines, 173 U.S. at 198.

The *Dewey* Court further stated: "If the question were only an enlargement of the one in the assignment of errors, or if it were so connected with it in substance as to form but another ground for alleging the invalidity of the [state court's] judgment," *Id.* at 197-98, the Court would allow the question to be raised for the first time in this Court. However, the Court held the substantive validity of the assessment presented a separate federal question from the question presented by the procedural irregularity of lack of notice and declined jurisdiction of the substantive issue presented for the first time in this Court. *Id.* at 198, 200-201.

Likewise, in *Illinois v. Gates,* 462 U.S. 213 (1983), this Court distinguished the procedural nature of the exclusionary rule from substantive Fourth Amendment claims, *id.* at 223-24, holding:

> Because of this distinction, we cannot say that modification or abolition of the exclusionary rule is "so connected with [the substantive Fourth Amendment right at issue] as to form but another ground or reason for alleging the invalidity" of the judgment. . . . Rather, the rule's modification was, for purposes of the "not pressed or passed upon below" rule, a separate claim that had to be specifically presented to the state courts.

Id. at 224 (citations omitted).

The question presented in the petition *sub judice* forms a completely separate federal question from the question presented by petitioner to the state court. Petitioner's challenge below raised a narrow procedural question relying on a different constitutional provision and different principles from the broad substantive question raised by petitioner in this Court. The Due Process issue of applying § 12-22-72 without

allowing oral argument on the appeal could have been raised and argued without in any way considering the validity of the statute under the Equal Protection Clause. Therefore, the statute's validity under the Equal Protection Clause constitutes a separate claim that had to be specifically presented to the state courts. The Petition for Certiorari, therefore, should be denied for the same reasons certiorari was denied in *Dewey v. Des Moines, supra,* and in *Illinois v. Gates, supra.*

B. This Court Should not Grant the Requested Writ for Prudential as well as Jurisdictional Reasons.

Respondent asserts that the "not pressed or passed upon below" rule is jurisdictional. *See Hill v. California,* 401 U.S. 797, 805-806 (1971); *State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 134, 160 (1945); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434-35 (1940); *Dewey v. Des Moines,* 173 U.S. 193, 198 (1899); *but see, Terminiello v. Chicago,* 337 U.S. 1 (1949); *Vachon v. New Hampshire,* 414 U.S. 478 (1974); *see also Illinois v. Gates,* 462 U.S. at 217-20. Even if the rule is not jurisdictional, serious prudential considerations weigh against allowing petitioner to raise the constitutionality of § 12-22-72 under the Equal Protection Clause for the first time in this Court.

First, and most important, is the notion of "comity" or a proper respect for the functions of state judicial institutions. *Cf. Younger v. Harris,* 401 U.S. 37 (1971). As this Court stated in *McGoldrick v. Compagnie Generale Transatlantique, supra,* "due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there." 309 U.S. at 435. *Accord Illinois v. Gates,* 462 U.S. at 221. Because the Alabama Supreme Court was not given the opportunity to consider the question presented by the Petition for Certiorari, this Court should decline to consider the issue.

A second prudential concern is that since the question raised in this Court was not raised below "the record is very

likely to be inadequate . . . ." *Illinois v. Gates*, 462 U.S. at 221 (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969)). Indeed, in this case the record is bereft of any development of facts that might bear on the determination of the legal issue sought to be raised. More importantly, the Alabama courts have not construed the statute's purpose and rationale in light of recent decisions of this Court and were not given the opportunity to do so in this case. Hearing this question without allowing Alabama courts to rule on it will deprive Alabama courts of the opportunity to articulate adequate and independent state grounds in support of the statute's validity.

The final prudential consideration concerns the determination of an issue of great public importance and far reaching significance on an inadequately prepared record. The use of appellate damage provisions is widespread. *See, e.g.*, Or. Rev. Stat. § 19.160 (1981); Va. Code § 16.1-113 (1982) (amended 1984). A decision on this statute could effect an upheaval of the appellate process throughout the country. Because of the obviously legitimate state objective of the statute and the precisely tailored means employed to achieve that end, any ruling concerning the statute's validity will call into question all such statutes in all states. By adhering to this Court's customary limitations on its discretion it avoids framing "broad rules, seemingly sensible on one set of facts which may prove ill-considered in other circumstances." *Illinois v. Gates*, 462 U.S. at 224.

C. The State Court below did not "Pass Upon" any Federal Question.

The Alabama Supreme Court did not "pass upon" the question presented *sub judice* or even the question presented by petitioner in its application for rehearing to the state court. In its mandate, the Alabama Supreme Court applied § 12-22-72 routinely and without comment. *See* Appendix to Petition for Cert. at A-1. Petitioner's application for rehearing was overruled without opinion. *Id.* at A-9. Such action does not rise to the level of having "passed upon" the issue for the purposes

of this rule. As this Court stated in *Illinois v. Gates*, "the routine restatement and application of settled law by an appellate court [does] not satisfy the 'not pressed or passed upon below' rule." 462 U.S. at 222-23 (citing *Morrison v. Watson*, 154 U.S. 111 (1894)).

II

THE PETITION FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION

Petitioner alleges that § 12-22-72 violates the Equal Protection Clause of the Fourteenth Amendment. Section 12-22-72 increases the amount of a judgment by ten percent any time an appellant files a supersedeas bond to stay execution on a judgment rendered against it and the judgment is affirmed on appeal without change.

The criteria for application of the statute operate without regard to race, creed, religion or any other suspect classification. Because the statute does not impose an invidious classification, the statute will violate the Equal Protection Clause " 'only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective,' *McGowan v. Maryland*, 366 U.S. 420 (1961), or if the objective itself is beyond the State's power to achieve, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *NAACP v. Alabama*, 377 U.S. 288 (1964); *Douglas v. California*, 372 U.S. 353 (1963)." *Lindsey v. Normet*, 405 U.S. 56, 70 (1972). In short, state procedures must be upheld if they are rationally related to legitimate state interests, and states are allowed wide latitude in legislating on social and economic issues. *City of Cleburne v. Cleburne Living Center*, 473 U.S. ____, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985).

Although the statute has been characterized as imposing a ten percent "penalty" upon the affirmance of "frivolous" or "delay" appeals, *see Chapman v. Rivers Construction Co.*, 284 Ala. 633, 645, 227 So. 2d 403, 415 (1969); *Montgomery Light & Water Power Co. v. Thombs*, 204 Ala. 678, 684, 87 So. 205, 211 (1920), the real purpose of § 12-22-72 is to provide ad-

ditional compensation to appellee litigants who are deprived of the use and benefit of their money during an appeal, after having proved an entitlement to judgment at trial and establishing that entitlement, without change, on appeal. *See, City of Birmingham v. Bowen,* 254 Ala. 41, 47, 47 So. 2d 174, 180 (1950). Section 12-22-72 applies automatically when a monied judgment or decree that is stayed on appeal by bond is affirmed without change. *See Chapman v. Rivers Construction Co., supra.* Because of its mandatory nature, the statute imposes damages in cases in which appellants may not subjectively intend to appeal solely for delay purposes. Likewise, many appellants raise novel or substantial questions on appeal that clearly are not "frivolous" if that term is defined to mean "wholly without merit" as it is frequently defined in cases deciding whether to impose discretionary penalties for "frivolous" claims or appeals. *Cf., e.g., Hughes v. Rowe,* 449 U.S. 5, 14 (holding that to award attorney's fees, under 42 U.S.C. § 1988, against a plaintiff in a civil rights action, "[t]he plaintiff's action must be meritless in the sense that it is groundless or without foundation.").

Section 12-22-72, however, applies an objective test to define "frivolous" or "delay" appeal in order to effectuate the purpose of the statute. An appeal is subject to the statute if the only *effect* of the appeal is to delay payment of the judgment. Whether an appeal is "frivolous" is determined by its result and not by the questions or contentions raised in the appeal. If the judgment is modified on appeal, even if it is affirmed in form (as where an appellee is ordered to remit part of the judgment), the statute does not apply. *See Chapman v. Rivers Construction Co.,* 284 Ala. 633, 644-45, 227 So. 2d 403, 414-15 (1969); *Montgomery Light & Water Power Co. v. Thombs,* 204 Ala. 678, 684, 87 So. 205, 211 (1920).

Because of the objective standard imposed, the means of the statute are tailored precisely to achieve the state's objective of compensating appellees in appropriate circumstances. While the statute may have the salutary effect of discouraging meritless appeals or appeals intended only for delay, it obviously

includes cases not in either category, because the statute's purpose is not simply to discourage meritless appeals or those pursued solely for delay. Further, as the Court stated in *Williamson v. Lee Optical*, 348 U.S. 483 (1955):

> The law need not be in every respect, logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Id. at 487-88.

The statute is designed to award appellees a reasonable amount of compensation under appropriate circumstances. Because the statute awards a percentage of the judgment, the amount awarded as damages by the statute varies directly with the amount of money withheld from an appellee during appeal. In this respect § 12-22-72 is identical to post-judgment interest. Thus, the statute is no more than an additional ten percent post-judgment interest charge for a statutory period of one year. Alternatively, the statute might be considered a statutory "origination fee" for the loan of appellee's money, in the amount of the judgment, to appellant.

Compensation of appellees deprived of the use of funds during appeal is an objective well within the legitimate powers of a state. Indeed, this Court affirmed the validity of a ten percent damage statute similar to § 12-22-72 in *Louisville & Nashville Railroad v. Stewart*, 241 U.S. 261 (1916) stating:

> [T]he railroad company obtained a supersedeas, and the law of the state makes 10 per cent the cost of it to all persons if the judgment is affirmed. There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld.

Id. at 263.

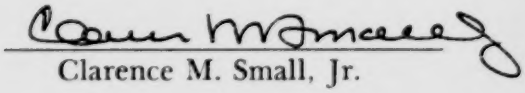
Because the objective of the statute is patently within the legitimate powers of the state, and because the means employed in the statute are tailored to award appellees a reasonable

amount only in appropriate circumstances, no substantial federal question is presented in the petition *sub judice*. Therefore, the Petition for Certiorari should be denied.

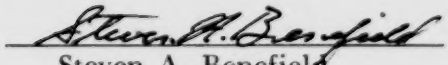
CONCLUSION

Because the Petition for Certiorari *sub judice* raises only one question which was neither pressed nor passed upon in the state court, and because the question presented is not a substantial federal question, the requested writ should be denied.

Respectfully submitted,



Clarence M. Small, Jr.



Steven A. Benefield

RIVES & PETERSON
1700 Financial Center
Birmingham, AL 35203
Tel: 205/328-8141

CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari have been served on counsel for all parties to this action by mailing such copies postage prepaid to the following this 20th day of November 1985:

HOBART A. MCWHORTER, JR., ESQ.
JOSEPH B. MAYS, JR., ESQ.
BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, AL 35203

Clarence M. Small, Jr.